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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUL 17 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of
Federal-State Joint Board on
Universal Service

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CC Docket No. 96-45

PETITION FOR RECONSIDERATION

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PETITION FOR RECONSIDERATION

Pursuant to Commission Rule 1.429, 47 C.F.R. § 1.429, Time Warner Communications Holdings, Inc. ("TW Comm"), a wholly-owned subsidiary of Time Warner Entertainment Company, L.P., by its attorneys, hereby petitions the Commission for reconsideration of its Report and Order in CC Docket No. 96-45 (released May 8, 1997), summarized, 62 Fed. Reg. 32,862 (June 17, 1997), recon. in part, FCC 97-246 (released July 10, 1997) ("Universal Service Order"). Specifically, TW Comm seeks reconsideration of the Commission's conclusion that in some circumstances a carrier other than the carrier that incurs the costs of providing service to a customer will receive the related universal service support. This conclusion is contrary to other principles adopted by the Commission in the Report and Order and violative of Section 254 of the Communications Act, as amended by the Telecommunications Act of 1996 (the "1996 Act").¹

I. The Report and Order is Internally Inconsistent

One of the basic principles necessary to achieve universal service goals - a principle adopted by the Report and Order - is that universal service support should be allocated to the

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

carrier that incurs the costs of providing the relevant service. However, as explained in further detail below, that principle cannot be reconciled with the Commission's standards on the level of a carrier's use of its own facilities necessary to qualify for universal service support. The Report and Order also adopts a second vital principle, the principle of competitive neutrality, that is inconsistent with the FCC's conclusions about the level of a carrier's own facilities that must be used to qualify for universal service support.

A. Universal Service Support Should be Allocated to the Carrier that Incurs the Costs to Provide the Service

The Report and Order states expressly, "universal service support should be provided to the carrier that incurs the costs of providing service to a customer."² TW Comm supports this conclusion and also agrees with the Commission's rationale for adopting the principle that universal service support should go to the carrier that incurs the related costs for providing the relevant services. As the Commission explained,

Under section 254(e), eligible telecommunications carriers are to use universal service support for the provision, maintenance, and upgrading of facilities and services for which the support is intended. When a line is served by an eligible telecommunications carrier, either an ILEC or a CLEC, through the carrier's owned and constructed facilities, the support flows to the carrier because that carrier is incurring the economic costs of serving that line.³

However, in the Report and Order, the Commission also reached conclusions regarding the level of a carrier's use of its own facilities necessary to qualify for universal service support that directly contradict the principle that universal service support should go to the carrier that

² Report and Order at ¶ 162 (footnote omitted).

³ Id. at ¶ 286 (footnote omitted).

incurs the related costs for providing the relevant services. Specifically, the Report and Order states that a carrier could satisfy Section 214(e)'s facilities requirement - and thereby qualify to receive universal service support - by relying on its own facilities only to provide access to operator services and obtain the remaining services designated for support from another carrier and offer them through resale:

[W]e conclude that a carrier could satisfy the facilities requirement by using its own facilities to provide access to operator services, while providing the remaining services designated for support through resale.⁴

Clearly, if a carrier is only providing access to operator services and is providing the remaining services through resale, it is incurring only a small fraction of the total cost of the service to the customer. However, the reseller will receive all of the related universal service support, in direct contradiction with the principle that the carrier that incurs the costs of providing service to a customer should receive the related universal service support.

In large part, this inconsistency is attributable to the FCC's improper determination in the Local Competition Order⁵ that new entrants should be permitted to obtain at discounted wholesale rates incumbent local exchange carrier ("ILEC") services which differ from those the ILEC offers to customers other than telecommunications carriers.⁶ Under the policies established

⁴ Id. at ¶ 169.

⁵ In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996)(Local Competition Order), stayed in part pending judicial review sub. nom., Iowa Utils. Bd. v. FCC, 109 F.3d 418 (8th Cir. 1996).

⁶ Pages 18-21 of TW Comm's Petition for Reconsideration of the Local Competition Order, filed September 30, 1996, further describe the inadvisability of the Local Competition (continued...)

by the Report and Order and the Local Competition Order, a new entrant could use its own facilities and functionalities to provide operator services and obtain universal service support, and yet still obtain ILEC services at the resale rate. Under such a scenario, the carrier that is actually incurring most of the costs associated with providing the universal services, the ILEC, would not receive the universal service support and would only receive the resale rate for the services it provides to the new entrant.

On reconsideration of the Local Competition Order, the Commission should revise its analysis and conclude that once an ILEC's service offerings are unbundled, a new entrant providing one of the unbundled services over its own facilities must either provide the remaining services over its own facilities or through the purchase of the ILEC's unbundled network elements. Pursuant to such a policy, a reseller offering access to operator services over its own facilities would be required to obtain the remaining service offerings from the ILEC as unbundled network elements or to invest in its own facilities in order to limit its reliance on the ILEC's unbundled network elements. An FCC policy that wholesale discounts are simply not available to a new entrant that offers access to operator services over its own facilities, while providing other services through resale, will go a long way towards ensuring that universal service support is allocated to the carrier that incurs the costs of providing that service. If the Commission does not reconsider the approach adopted by the Local Competition Order, it should not allow a reseller offering access to operator services over its own facilities, while providing

⁶ (...continued)

Order's decision to unbundle the facilities and functionalities of providing operator services and directory assistance from resold services and other network elements.

the remaining services designated for support through resale, to receive universal service support. Otherwise, as explained above, that reseller will receive universal service support in direct contradiction with the principle that the carrier that incurs the costs of providing service to a customer should receive the related universal service support.

Moreover, it is difficult, if not impossible, to reconcile the Report and Order's conclusion that a reseller that uses its own facilities to provide access to operator services, while providing the remaining services designated for support through resale, is eligible for universal service support but a pure reseller, that provides all services through resale, is not. On reconsideration, the Commission should apply the rationale that it relied on when it decided not to provide universal service support to resellers and conclude that a reseller that only provides access to operator services over its own facilities is not eligible for universal service support. As the Commission explained,

we conclude that carriers that provide service throughout their service area solely through resale are not eligible for support. . . . The purpose of the support is to compensate carriers for serving high cost customers at below cost prices. When one carrier serves high cost lines by reselling a second carrier's services, the high costs are borne by the second carrier, not by the first, and under the resale pricing provision the second carrier receives revenues from the first carrier equal to end-user revenues less its avoidable costs. Therefore it is the second carrier, not the first, that will be reluctant to serve absent the support, and therefore it should receive the support.⁷

Similarly, when a reseller only provides access to operator services over its own facilities, the relevant high costs are similarly borne by the second carrier, not by the reseller. Accordingly, in such an instance, the second carrier, not the reseller, should receive the universal service support.

⁷ Report and Order at ¶ 290 (footnote omitted).

B. Principle of Competitive Neutrality

The conclusions in the Report and Order about the level of a carrier's use of its own facilities necessary to qualify for universal service support are also inconsistent with another guiding principle adopted in the Report and Order, the principle of competitive neutrality. That principle requires universal service support mechanisms and rules to be competitively neutral. Specifically, in the context of universal service support the Report and Order stated that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another"⁸

The Commission's decision to provide universal service support to a reseller offering access to operator services over its own facilities but providing all other services through resale, significantly disadvantages other providers. First, it disadvantages the carriers that are actually incurring the high costs for providing the services at issue (the incumbent local exchange carriers that are selling the services other than operator access to the reseller at a wholesale discount). Second, it disadvantages facilities-based competitive local exchange carriers ("CLECs"). CLECs seeking to enter the market as facilities-based providers will incur significant costs to provide services (and qualify for universal service support). In contrast, resellers offering access to operator services will be eligible for that support by incurring only the relatively insignificant costs associated with providing access to operator services.

Moreover, the Commission's decision to provide universal service support to a reseller providing access to operator services over its own facilities but providing all other services

⁸ Id. at ¶ 47.

through resale is also not competitively neutral because it places certain resellers at a distinct advantage. Specifically, in order to become eligible for universal service support, interexchange carriers that already provide access to operator services will only need to incur a very small fraction of the total cost of providing service to the customer. In contrast, other resellers will, at a minimum, be required to incur costs to obtain facilities to provide at least one of the designated services.⁹

Although the Report and Order recognized that it would be virtually impossible to achieve competitive neutrality in the near future, the Commission did emphasize that it should “limit the ability of competitors to make decisions to enter local markets based on artificial economic incentives created under the modified existing mechanism.”¹⁰ On reconsideration, the Commission is presented with the opportunity to limit the artificial economic incentives that are present for a reseller to enter the market by incurring relatively little costs by offering a low-cost designated service but nonetheless satisfying the facilities requirement of Section 214(e) and thus, becoming eligible for universal service support. These artificial economic incentives contradict the principle of competitive neutrality adopted in the Report and Order.

II. The Report and Order Violates the Communications Act

The Report and Order’s conclusion that a carrier could satisfy the facilities requirement by using its own facilities to provide access to operator services while providing the remaining services designated for support through resale also violates the Communications Act.

⁹ See id. at ¶ 169.

¹⁰ Id. at ¶ 173.

Specifically, Section 254(e) of the Communications Act requires a carrier that receives universal service support to use that support for the facilities and services for which it is intended.

A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.¹¹

The Commission's policy allows certain resellers to obtain universal service support, even though it is clear that many of these carriers will not use the bulk of such support to maintain or upgrade facilities. In part, this is attributable to the fact that the services that the reseller will provide on a facilities-basis are not high cost and accordingly, the high costs will be borne by a second carrier. Not surprisingly, a carrier that only provides access to operator services through its own facilities would be unlikely to use more than an insignificant amount of that support to provide, maintain and upgrade its operator access services and their related facilities. At best, the reseller would spend that money on marketing and software additions, thereby frustrating universal service goals.

The Report and Order's policy to allow certain resellers to obtain universal service support even though their use of their own facilities is de minimis also violates Section 214(e) of the Communications Act. Section 214(e)(1) provides

A common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support in accordance with section 254 . . . and shall . . . (A) offer the services that are supported by Federal universal support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and the

¹¹ 47 U.S.C. § 254(e).

resale of another carrier's services¹²

Thus, as the Report and Order emphasizes, Section 214(e) requires the use of a carrier's "own facilities" in the provision of the services designated for universal support.

[S]ection 214(e)(1)(A) expressly mandates the use of a carrier's "own facilities" in the provision of the services designated for universal service support.¹³

Even if the statute could be construed to require a carrier to use its own facilities to provide only one of the designated services to satisfy the facilities requirement of Section 214(e), the provision of access to operator services alone should not satisfy the facilities requirement of Section 214(e).¹⁴ Such an interpretation guts Section 214(e)(1)(A)'s mandate entirely. Put simply, the provision of operator access services over a carrier's own facilities constitutes such a small portion of the total services provided to a customer that to allow it to satisfy the facilities requirement of Section 214(e) essentially renders that requirement meaningless.

¹² 47 U.S.C. § 214(e)(1).

¹³ First Report and Order at ¶ 180 (footnote omitted).

¹⁴ Id. at ¶ 169.

CONCLUSION

For the foregoing reasons, TW Comm respectfully requests that the Commission reconsider those aspects of its Report and Order identified herein.

Respectfully submitted,

**TIME WARNER COMMUNICATIONS
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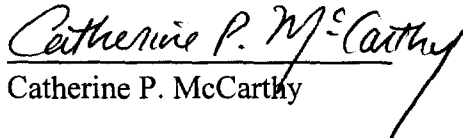
Dated: July 17, 1997

CERTIFICATE OF SERVICE

I, Catherine P. McCarthy, hereby certify that a true and correct copy of the foregoing Petition for Reconsideration of Time Warner Communications Holdings, Inc. was served, this 17th day of July, 1997, via hand-delivery, to the following:

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